Supreme Court, U.S.
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No. 97-1320

In The

Supreme Court of the United States

October Term, 1997

BRUCE W. DAVIS, *et al.*,

Petitioners,

v.

THE CITY OF HOLLYWOOD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

RELEVANT STATUTES AND REGULATIONS 1

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 5

I. THE ELEVENTH CIRCUIT'S DECISION IN *DAVIS* DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR OTHER CIRCUITS 6

A. *Davis* Is Consistent With *Auer* 6

B. *Davis* Does Not Conflict With Other Circuits With Regard To The Window Of Correction 10

C. *Davis* Does Not Conflict With The Secretary Of Labor's Interpretation Of The Window 12

II. THE PETITIONERS' ISSUES RELATING TO THE COSTS AWARDED TO THE CITY ARE MOOT INSOFAR AS THE CITY HAS WAIVED ITS RIGHT TO SUCH COSTS AND FILED SATISFACTIONS OF JUDGMENT AS TO THE COSTS AWARDED AT BOTH THE TRIAL AND APPELLATE LEVELS 14

III. IN THE EVENT THE COURT SHOULD, NONETHELESS, CONSIDER THE PETITIONERS' ARGUMENTS RELATING TO COSTS, THE AWARD OF COSTS IS CONSISTENT WITH APPLICABLE STATUTES AND CASELAW 15

TABLE OF CONTENTS – Continued

Page

IV. THE *DAVIS* DECISION DOES NOT RAISE IMPORTANT AND UNRESOLVED PROBLEMS WITH FAR-REACHING OR RECURRING IMPLICATIONS 19

V. THE ALLEGED INVALIDITY OF THE WINDOW OF CORRECTION REGULATION IS NOT A BASIS FOR THIS COURT TO GRANT CERTIORARI REVIEW 19

VI. THE PETITIONERS' ARGUMENT REGARDING REASSIGNMENT ON REMAND IS INSUFFICIENT TO WARRANT CERTIORARI REVIEW OF *DAVIS* 22

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 16

Anderson v. Bessemer City, 470 U.S. 564 (1985) 22, 23

Auer v. Robbins, 117 S. Ct. 905 (1997)..... *passim*

Balgowan v. New Jersey Department of Transportation, 115 F.3d 214 (3d Cir. 1997) 11, 12

Bowman v. City of Indianapolis, 133 F.3d 513 (7th Cir. 1998) 9

Childers v. City of Eugene, 120 F.3d 944 (9th Cir. 1997).....9, 11

Davis v. City of Hollywood, 120 F.3d 1178 (11th Cir. 1997)..... *passim*

Fegley v. Higgins, 19 F.3d 1126 (6th Cir. 1994)..... 17

Friedman v. Ganassi, 853 F.2d 207 (3rd Cir. 1988)..... 16

Garcia v. City of San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985)..... 9

Hoffmann v. Sbarro, Inc., 982 F. Supp. 249 (S.D.N.Y. 1997).....10, 13

In Re Colony Square, 819 F.2d 272 (11th Cir. 1987) 23

Klem v. County of Santa Clara, Case Nos. C-91-20674 RMW, C-95-20454 RMW (N.D. Cal. 1998) (P.App. 57) 12

Kreager v. Solomon & Flanagan, P.A., 775 F.2d 1541 (11th Cir. 1985).....16, 17

Martin v. Malcolm Pirnie, Inc., 949 F.2d 611 (2nd Cir. 1991) 11

TABLE OF AUTHORITIES – Continued

Page

Matthews v. Allis Chalmers, 769 F.2d 1215 (7th Cir. 1985) 15

Moses H. Cone Memorial Hospital v. Mercury Construction Corporation, 460 U.S. 1 (1983) 18

North Carolina v. Rice, 404 U.S. 244 (1971), *quoting from United States v. Alaska S.S. Co.*, 253 U.S. 113 (1920) 14

Offutt v. United States, 348 U.S. 11 (1954) 22

Preiser v. Newkirk, 422 U.S. 395 (1975), *citing U.S. v. SCRAP*, 412 U.S. 669 (1973) 14

Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158 (1989) 20, 21

Spradling v. City of Tulsa, 95 F.3d 1492 (10th Cir. 1996), *cert. den.*, 117 S. Ct. 1081 (1997) 10, 11

Stanley v. City of Tracy, 120 F.3d 179 (9th Cir. 1997) 9

Steffel v. Thompson, 415 U.S. 452 (1974) 14

Texas v. Mead, 465 U.S. 1041 (1984) 8

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) 18

U.S. v. Ramos, 933 F.2d 968 (11th Cir. 1991), *citing Whitehearst v. Wright*, 592 F.2d 834 (5th Cir. 1979) 23

United States v. Johnston, 268 U.S. 220 (1925) 8

STATUTES

29 C.F.R. § 541.118(a) 20

29 C.F.R. § 541.118(a)(6) 4, 7

TABLE OF AUTHORITIES – Continued

Page

5 U.S.C. § 706 ..... 1, 19

15 U.S.C. § 77k 16

29 U.S.C. § 213(a)(1) (1996) 3

29 U.S.C. § 216(b) 15, 16, 17, 18, 21

29 U.S.C. § 255(a) 1, 21

RULES

Fed.R.Civ.P. 54(d)(1) 15, 16, 18

Fed.R.Civ.P. 54(d)(2) 16

Sup.Ct.R. 10 ..... 5, 16

Sup.Ct.R. 10(a) 5

Sup.Ct.R. 10(c) 5

Sup.Ct.R. 14 1

RELEVANT STATUTES AND REGULATIONS[1]

29 U.S.C. § 255. Statute of Limitations

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wage, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Avis Act –

> (a) if the cause of action accrues on or after May 14, 1947 – may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued; * * *

5 U.S.C. § 706. Scope of Review

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –
>
> > (1) compel agency action unlawfully withheld or unreasonably delayed; and

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[1] The Petitioners have failed to include certain statutory provisions relevant to the arguments raised in the Petition and in this Brief in Opposition as required by Sup.Ct.R. 14. Accordingly, the Respondent is supplementing the initial presentation of relevant statutory and regulatory authorities.

(2) hold unlawful and set aside agency action, findings and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

STATEMENT OF THE CASE[2]

The Petitioners were high-level management employees of the City of Hollywood ("City") who were designated by the City as exempt under the Fair Labor Standards Act ("FLSA") pursuant to 29 U.S.C. § 213(a)(1). They were among the highest paid of all City employees during the relevant period. The Petitioners filed suit against the City alleging that employees designated by the City as exempt under the FLSA had actually lost wages as a result of partial-day absences. This claim of deductions for partial-day absences was the only basis alleged by the Petitioners to support their claim that the City had violated the FLSA. Despite extensive discovery, however, the Petitioners were unable to find a single exempt City employee who had wages deducted for absences of less than a day during the period from 1986 through 1994, the time frame relevant to this lawsuit.

While the Petitioners were unable to find any employees, including themselves, who had ever suffered an actual deduction of pay for a partial day absence, the City became aware during the course of trial discovery that an exempt employee had been suspended for a one-week period. As a result of this information, the City immediately initiated an internal audit. During the course of this audit, the City discovered that between 1986 and 1994 there were four instances of suspensions

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[2] References to the Petitioners' appendix shall appear as "P.App. ___" while references to the Respondent's appendix shall appear as "R.App. ___."

for periods of less than a week.[3] In addition to the instance of a one-week suspension, the City also discovered that another exempt employee had been suspended for two weeks. The City employed in excess of one hundred individuals in exempt capacities during the eight-year period.

Immediately upon the discovery of the suspensions, the City invoked the window of correction provided by 29 C.F.R. § 541.118(a)(6), reimbursed the individuals suspended and instituted a policy prohibiting suspensions for periods of less than one week. Several months later, the City broadened its policy, reimbursed the two individuals who had been suspended for week-long periods and entered a blanket policy prohibiting all suspensions, of whatever duration, for exempt employees.[4]

The Petitioners were also unable to establish the existence of any written policies of the City which specifically allow or prescribe disciplinary suspensions for exempt employees. Contrary to the Petitioners' assertion, neither the district court nor the Court of Appeals for the Eleventh Circuit ever made a factual or legal determination that the City had "an established written policy" specifically applicable to exempt employees. The only written policies mentioned by the Petitioners are policies that

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[3] The Petitioners erroneously state that as many as eight suspensions occurred. (Pet. at 20) This is inconsistent with the facts and the factual findings of the trial court. (P.App. 22)

[4] The reimbursements made to the employees who suffered one- and two-week suspensions were made in an abundance of caution. As noted below, caselaw and Department of Labor opinions state that weeklong suspensions do not destroy the exempt status of employees under the FLSA.

apply generically to all employees, but do not actually state that exempt employees will be subject to disciplinary suspensions. It is perfectly possible for the personnel policies referenced by the Petitioners to be given full effect without drawing the inference that pay deductions are an anticipated form of punishment for exempt employees.

REASONS FOR DENYING THE WRIT

Rule 10 of the Rules of the Supreme Court states that a writ of certiorari will be granted "only for compelling reasons." Among the different reasons upon which the Court may base the issuance of a writ of certiorari are (1) conflict between the decision of a United States court of appeal and relevant decisions of this Court, Sup.Ct.R. 10(c); (2) conflict between the decisions of the United States courts of appeal with respect to the same important matter, Sup.Ct.R. 10(a); and (3) a decision rendered by a United States court of appeal with respect to an important question of federal law that has not been, but should be, settled by this Court, Sup.Ct.R. 10(c).[5] A petition for a writ of certiorari is "rarely granted" merely to have this Court review erroneous findings of fact or the misapplication of a properly stated rule of law. Sup.Ct.R. 10.

As argued herein, the Petitioners have not satisfied the requirements for invoking this Court's certiorari

[5] Other bases for certiorari review are articulated in Rule 10, but do not appear to serve as appropriate bases for review under the facts of this case.

review. At best, the Petitioners are asking this Court to reconsider the factual findings of the trial court with respect to the existence of certain written personnel policies or to "correct" the Eleventh Circuit's purported misapplication of the window of correction, a rule of law that was correctly stated below.

I. THE ELEVENTH CIRCUIT'S DECISION IN *DAVIS* DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR OTHER CIRCUITS[6]

A. *Davis* Is Consistent With *Auer*

The Eleventh Circuit's decision in *Davis v. City of Hollywood*, 120 F.3d 1178 (11th Cir. 1997) is completely consistent with this Court's decision in *Auer v. Robbins*, 117 S. Ct. 905 (1997). The Petitioners appear to concede, based upon their reliance on *Auer*, that the window of correction is still available to an employer despite the existence of an actual disciplinary suspension and a general departmental policy that allows for the possibility of suspension for all employees. They argue, however, that *Auer* did not address the factual scenario in the instant

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[6] The first question presented by the Petitioners, as phrased, is a non-issue, insofar as there has been no factual finding in the record below that the City ever had "an established written policy" which permitted "repeated improper deductions." Moreover, as argued below, the pertinent inquiry is not whether "an established written policy existed," but rather whether such a policy "effectively communicated" to exempt employees that pay deductions were an anticipated form of punishment. As such, the first question presented by the Petitioners cannot be extracted from the opinion below or supported by the record.

case. (Pet. at 17) Their argument, therefore, that *Davis* is necessarily inconsistent with *Auer* is without merit.[7]

Auer resolved authoritatively the question of whether the term "or" in 29 C.F.R. § 541.118(a)(6) is to be read disjunctively, as decided in *Davis*, or conjunctively, as argued by the Petitioners before the trial court and later on appeal. *Auer* concluded that the window of correction is applicable to an employer who has made certain improper deductions if the deductions were made *either* "inadvertently" *or* "for reasons other than lack of work." *Auer*, 117 S. Ct. at 912. The *Davis* court specifically acknowledged the ruling in *Auer* and concludes, by necessity, that the window of correction can be applied by the City where the deductions were made inadvertently *or* "for reasons other than lack of work." *Davis*, 112 F.3d at 1181.

Davis is also consistent with *Auer* with regard to the *nature* of deductions that would permit an employer to apply the window of correction. In *Auer*, this Court cited to the Secretary of Labor's regulatory interpretation which permits the use of the window of correction unless there exists, as to exempt employees, "a clear and particularized policy – one which 'effectively communicates' that deductions will be made in specified circumstances." *Auer*, 117 S. Ct. at 911. The policy at issue in *Auer* consisted of a "manual" which "nominally covered" all department employees, regardless of exempt status. The policy further specifically provided that disciplinary deductions

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[7] Not surprisingly, the Petitioners do not cite any post-*Auer* decisions wherein it is even suggested that *Davis* has created a conflict with this Court's jurisprudence.

in pay could be imposed. *Id.* In *Davis*, the only written documents upon which Petitioners relied to create an "established written policy" as to exempt employees involved general personnel policies that applied to all employees, regardless of their exempt status. Such general policies are identical to those at issue in *Auer* with respect to which the Court permitted the use of the window of correction.

The Eleventh Circuit rendered its opinion in *Davis* "under the facts of this case," and did not urge any broader interpretation or application of its holding.[8] (P.App. 5) In effect, the court in *Davis* failed to find, under the particular facts at issue, that the personnel policies from the various departments "effectively communicated" that pay deductions to exempt employees were an anticipated form of punishment. The City "rules" cited by the Petitioners are precisely the same kind of general policies which *Auer* and the Secretary of Labor found do not "effectively communicate" to exempt employees that they may be suspended as a disciplinary penalty, thereby creating an improper "policy" of suspension. Therefore, the Eleventh Circuit correctly concluded, in accordance with the holding in *Auer*, that the window of correction was available to the City in this case.

In addition, there is no "pattern" of deductions that would establish an "actual practice of making such deductions." Although the factual scenario in *Auer* dealt

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[8] This Court has previously held that it does not grant certiorari to review evidence or to discuss specific factual situations. *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see also Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J.).

with a single deduction, the *Auer* case and other post-*Auer* circuit court decisions addressing this issue are not inconsistent with the conclusions reached in *Davis*. In *Davis*, the City employed in excess of one hundred exempt employees from 1986 through 1994.[9] With regard to more than one hundred exempt employees over an eight-year period, there were only *four deductions* that occurred for periods of less than a week.[10] Notwithstanding case law and Department of Labor opinions to the contrary, the City, in an abundance of caution, also reimbursed two employees who had weeklong suspensions.

In all, there were only four suspensions of exempt employees for less than a week and two suspensions for a

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[9] Petitioners cite to disciplinary suspensions in 1980 and 1983, prior to the application of the FLSA to public entities through *Garcia v. City of San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). The existence of two suspensions prior to the application of *Garcia* are irrelevant and cannot be used to establish a pattern or for any other purpose. In fact, the reference to such deductions is improper and subject to being stricken.

[10] Courts have prohibited partial-day suspensions of otherwise exempt employees, but not one-week suspensions. *Bowman v. City of Indianapolis*, 133 F.3d 513 (7th Cir. 1998) (suspensions without pay for less than one week may destroy an employee's exempt status); *Childers v. City of Eugene*, 120 F.3d 944, 947 (9th Cir. 1997) (municipality complied by adopting policy that exempt employees could not be suspended for periods of less than one week); *see also, Stanley v. City of Tracy*, 120 F.3d 179 (9th Cir. 1997) (implying that suspensions of less than one week do not destroy exempt status). Additionally, DOL opinions specifically provide that exempt employees *can* be suspended for one-week periods. *See, e.g.*, DOL Op. Ltr. March 29, 1991; DOL Op. Ltr. September 10, 1992.

weeklong period. Interestingly, at least one federal court has disagreed with the Petitioners' argument that such deductions must, *ipso facto*, constitute a "pattern" of improper deductions. The Southern District of New York in *Hoffmann v. Sbarro, Inc.*, 982 F. Supp. 249 (S.D.N.Y. 1997) specifically noted as follows:

> The Eleventh Circuit's decision in *Davis* is not facially inconsistent with the Secretary's interpretation, in that six improper deductions over an eleven-year period could be construed not to constitute a "pattern" of improper deductions.

Id. at 257 n.12.

Although *Auer* admittedly involves a one-time deduction, its reasoning is not inconsistent with that of the Eleventh Circuit in *Davis*, nor would the Court's decision in *Auer* necessarily warrant a different result under the facts of this case.

B. *Davis* Does Not Conflict With Other Circuits With Regard To The Window Of Correction.

The Petitioners do not cite any post-*Auer* circuit court decisions that conflict with *Davis* on the interpretation or application of the window of correction. In fact, the Petitioners do not even cite to a circuit court decision that has declared itself to be in conflict with *Davis*. *Spradling v. City of Tulsa*, 95 F.3d 1492 (10th Cir. 1996), *cert. den.*, 117 S. Ct. 1081 (1997) was decided *before Auer* and states that a "settled policy" of making improper deductions precludes the operation of the window of correction. Significantly, the *Spradling* court's basis for finding a "settled policy," a policy that was nominally applicable to both

exempt and non-exempt employees, was rejected by the court in *Auer*.[11] *Auer*, 117 S. Ct. at 910. In *Childers*, the Ninth Circuit, in fact, applied the window of correction despite the actual suspension of an exempt employee. *Childers*, 120 F.3d at 947. The municipal employer later reimbursed the suspended employee and instituted a new policy prohibiting any further similar suspensions. *Childers* does not create a conflict in any way with *Davis*.

Finally, the Petitioners cite to *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611 (2nd Cir. 1991), which was decided six years *before Auer* and must be interpreted as having been effectively overruled or clarified by *Auer*. In *Malcolm Pirnie*, the court found that the window of correction was not applicable due to the existence of a "policy guide" which applied to all employees. *Id.* at 616. This kind of employment manual which does not constitute a "clear and particularized policy" as to exempt employees is specifically rejected by *Auer* as being an insufficient basis to prohibit the application of the window of correction. *Auer*, 117 S. Ct. at 911. In addition, *Malcolm Pirnie* does not interpret the window of correction in a disjunctive manner, an interpretation which itself directly conflicts with *Auer*.[12]

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[11] More significantly, the Tenth Circuit noted in *Spradling* that the municipal employer had stipulated that the salaries of exempt employees were "subject to reduction as a form of discipline" pursuant to a written policy. *Spradling*, 95 F.3d at 1503. The City in *Davis* made no such stipulation, and no such finding was ever made by the trial court.

[12] The Petitioners do not cite to the Court the decision in *Balgowan v. New Jersey Department of Transportation*, 115 F.3d 214 (3d Cir. 1997), which holds that the window of corrections

C. *Davis* Does Not Conflict With The Secretary Of Labor's Interpretation Of The Window.

The Secretary of Labor has not chosen to file an *amicus curiae* brief in this case and has not expressed any opinion or interpretation of the window as to the *particular* facts in this case which were relied upon and served as the basis for the Eleventh Circuit's decision. As a result, the Petitioners' reliance on the Secretary's *amicus* brief in *Klem v. County of Santa Clara*, Case Nos. C-91-20674 RMW, C-95-20454 RMW (N.D. Cal. 1998) (P.App. 57) is misplaced. The factual circumstances underlying the Secretary's position in *Klem* are distinguishable from the facts in this case.[13] However, the Secretary's opinion, as expressed in *Auer*, is completely consistent with *Davis*.

As stated in *Auer*, the Secretary "requires a clear and particularized policy – one which "effectively communicates that deductions will be made in specified circumstances." *Auer*, 117 S. Ct. at 911. In the instant case, there

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should be interpreted in the disjunctive and that it would have been available notwithstanding the docking of any employee's pay for disciplinary reasons. *Balgowan* is consistent with both *Auer* and *Davis*.

[13] In *Klem*, more than 50 actual deductions took place during a six-year period. (Pet. at 20) While the Petitioners accuse the City of "seiz[ing]" upon an "absolute number of actual deductions," the petitioners engage in their own mathematical fixation by implicitly arguing that percentages are the appropriate standard to be applied. (Pet. at 20-21) The Petitioners' "formula" is no more valid a method for applying a non-formulaic standard such as the window of correction than any other.

is no "clear and particularized policy." Instead, there is only a general policy which applies to all employees. This is precisely the kind of "policy" which, in accordance with the Secretary's own analysis, does not require that the status of exempt employees be lost.

According to the Petitioners, the Secretary states that the window of correction should not be allowed where an employer "has engaged in an unmistakable pattern of making impermissible deductions from pay pursuant to an established policy." (Pet. at 20) As stated earlier, the particular facts in *Davis* do not constitute an established policy, and neither the trial court nor the Eleventh Circuit made such a finding. Furthermore, there is absolutely no caselaw or opinion from the Secretary which finds that four suspensions of less than a week over a six-year period constitutes a "pattern of impermissible deductions." The Petitioners inaccurately state that "eight out of one hundred exempt employees" were improperly suspended. (Pet. at 8, 20) In fact, under current caselaw and Department of Labor opinions, only four impermissible suspensions took place over a six-year period as to well *over* one hundred exempt employees. *See, supra*, note 9. The Secretary has never found or opined that four such suspensions constitute a "pattern."

Interestingly, the Petitioners cite to *Hoffman* as a case of which the Secretary has approved. The court in *Hoffman* specifically found that the number of suspensions which occurred in *Davis* "could be construed *not* to constitute a 'pattern' of improper deductions." *Hoffman*, 982 F. Supp. at 257 n.12 (emphasis supplied).

In short, while the Secretary has stated no opinion as to the particular facts in this case, the facts and holding of the Eleventh Circuit are not inconsistent with previous opinions of the Secretary.

II. THE PETITIONERS' ISSUES RELATING TO THE COSTS AWARDED TO THE CITY ARE MOOT INSOFAR AS THE CITY HAS WAIVED ITS RIGHT TO SUCH COSTS AND FILED SATISFACTIONS OF JUDGMENT AS TO THE COSTS AWARDED AT BOTH THE TRIAL AND APPELLATE LEVELS.

The City has filed satisfactions of judgment with respect to the cost awards entered by the trial court and by the Eleventh Circuit. (R.App. 1-4) As such, the issues raised by the Petitioners with respect to those cost awards are moot. The rule in federal cases is that an *actual* controversy must be extant at all stages of review, not merely at the time the complaint is filed. *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974). "Mootness is a jurisdictional question because the Court 'is not empowered to decide moot questions or abstract propositions'. . . . " *North Carolina v. Rice*, 404 U.S. 244, 246 (1971), *quoting from United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920). The petition must raise something more than an "ingenious academic exercise in the conceivable" and the Petitioners must allege that they have been or will be, in fact, perceptibly harmed by the contested action. *Preiser v. Newkirk*, 422 U.S. 395, 403 (1975), *citing U.S. v. SCRAP*, 412 U.S. 669, 688-89 (1973).

In this instance, the Petitioners are requesting, under whatever legal theory, that the award of costs against them be overturned. The City disputes that the award of

costs in its favor was in error. The City further disputes that the Petitioners are entitled to an award of costs as prevailing parties. Nonetheless, the City has chosen not to pursue its cost judgments against present and former employees and has satisfied those judgments, thereby absolving the Petitioners of any financial responsibility they may have had with respect to the judgments. Accordingly, the Petitioners' arguments with respect to the awarding of costs below is moot.

III. IN THE EVENT THE COURT SHOULD, NONETHELESS, CONSIDER THE PETITIONERS' ARGUMENTS RELATING TO COSTS, THE AWARD OF COSTS IS CONSISTENT WITH APPLICABLE STATUTES AND CASELAW

Without citing a case that conflicts with the decision to award costs in this case, the Petitioners wrongly contend that the Eleventh Circuit is in conflict with this Court and other circuits in holding that 29 U.S.C. § 216(b) does not preclude an award of costs to an employer. Section 216(b) merely follows the well-established principle of awarding costs to a prevailing plaintiff. Fed.R.Civ.P. 54(d)(1) provides that costs "shall be allowed to the prevailing party" except when the court directs otherwise or when an "express provision" is made by federal law or procedural rules.

Since 29 U.S.C. § 216(b) does not contain an express provision limiting the right of the employer to recover taxable costs, Rule 54(d)(1) applies and costs are properly awarded to the prevailing employer. *See Matthews v. Allis Chalmers*, 769 F.2d 1215, 1219 (7th Cir. 1985), *overruled on*

other grounds, 846 F.2d 457 (7th Cir. 1988) ("[S]ection 16 of the FLSA] . . . does not constitute 'an express provision' precluding the award of costs to a prevailing defendant. That section merely details the remedies available to prevailing plaintiffs, without addressing the award of costs available to successful defendants.").

Ironically, the case cited by the Petitioners as conflicting in principle with *Davis*, *Friedman v. Ganassi*, 853 F.2d 207 (3rd Cir. 1988), makes clear that Rule 54(d)(1) applies in this case. In *Friedman*, the court distinguished between (1) taxable costs referred to by Rule 54(d)(1) and (2) attorney fees and other litigation expenses, holding that § 11 of the Securities Act of 1933, 15 U.S.C. § 77k, which bars attorney's fees to a prevailing defendant unless the plaintiff's suit is totally without merit, did not preclude an award of costs to a prevailing defendant under Rule 54(d)(1). Similarly, § 216(b) does not preclude an employer from recovering taxable costs.

Unlike another case cited by the Petitioners – *Kreager v. Solomon & Flanagan, P.A.*, 775 F.2d 1541 (11th Cir. 1985)[14] – the instant case does not involve an award of *attorney's fees* to the City. *Kreager* is cited as conflicting because the court held that § 216(b) did not authorize awarding attorney fees to employers. However, *Kreager* merely followed the "American Rule" in that, absent a specific provision of Congress, a litigant may not recover attorney's fees. *Id.* at 1542-43, *citing to Alyeska Pipeline*

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[14] Even if, *arguendo*, a conflict with *Kreager* existed, a conflict within a circuit does not provide a basis for certiorari review. Sup.Ct.R. 10.

Service Co. v. Wilderness Society, 421 U.S. 240, 257 (1975).[15] The "American Rule" and *Kreager* have no application to the instant case, which does not concern attorney's fees. The other case cited by the Petitioners – *Fegley v. Higgins*, 19 F.3d 1126 (6th Cir. 1994) – is similarly inapposite because the court held, consistent with the "American Rule," that § 216(b) did not authorize the award of attorney's fees to employers.

Additionally, the Petitioners argue that the City was not the prevailing party. That conclusion, however, ignores the facts and results achieved in the case. First, the Petitioners did not prevail on the allegations of their complaint, which alleged that the City improperly docked the pay of exempt employees for absences of less than a day. By far, the taxable costs were principally spent refuting the Petitioners' claims that their pay was docked due to partial-day absences. Second, the Petitioners continued to contest the case even after the City exercised the window of correction. The City clearly prevailed in its effort to apply the window of correction and, as a result, must be considered to have prevailed in the litigation.

While the Petitioners are requesting that they be permitted, on remand, to petition the trial court for attorney's fees and costs as "prevailing parties," such a request is untimely. The Petitioners concede they did not raise the issue of their status as "prevailing parties" and their alleged entitlement to attorney's fees and costs until they petitioned the Eleventh Circuit for rehearing *en banc*.

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[15] In fact, the *Kreager* court remanded the case to the trial court for a determination of whether the defendant was entitled to attorney's fees for bad faith litigation pursued by the plaintiff. *Kreager*, 775 F.2d at 1544.

At no time did the Petitioners request that the trial court designate them "prevailing parties." *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 29 (1983) (court of appeals need not rule upon issue not presented to trial court).

Their belated suggestion that they deliberately chose not to do so because of the trial court's invalidation of the salary basis test is a *non sequitur*. The Petitioners are now claiming "prevailing party" status because of the employee "benefits" they achieved by "forcing" the City to invoke the window of correction and "admit" to certain FLSA violations. These alleged "benefits" were "achieved" irrespective of the trial court's determination as to the validity of the salary basis test. The same facts which would supposedly support the Petitioners' claim on remand to "prevailing party" status existed at the time the trial court ruled upon the parties' pending motions for summary judgment. The Petitioners could have petitioned the trial court for "prevailing party" status, notwithstanding the trial court's invalidation of the salary basis test, and preserved their record on appeal. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42 n.5 (1985) (claim not raised below bound to fail on review). For reasons unknown, the Petitioners failed to do so. As a result, they are precluded from making such a claim in their petition. *Moses H. Cone*, 460 U.S. at 29.

Finally, the Petitioners do not cite to any cases supporting their claim that the award of taxable costs in this case is contrary to 29 U.S.C. § 216(b) and Rule 54(d)(1).

IV. THE *DAVIS* DECISION DOES NOT RAISE IMPORTANT AND UNRESOLVED PROBLEMS WITH FAR-REACHING OR RECURRING IMPLICATIONS

As stated earlier, the Eleventh Circuit, itself, limits the *Davis* decision to its particular facts. *Davis* is consistent with *Auer* and other circuits interpreting *Auer*. Although the Secretary has not expressed an opinion as to *Davis*, the *Davis* decision is consistent with previous opinions expressed by the Secretary.

There is no basis to believe that *Auer* has created confusion in the courts or abuse by employers, as alleged by the Petitioners. *Auer* was cited by the Eleventh Circuit in *Davis* and the cases decided by trial and appellate courts since *Auer* do not demonstrate the existence of "erroneous impressions and abuses created by misinterpretations of *Auer*," as alleged by the Petitioners. (Pet. at 26)

In summary, *Davis* is a solid, logical opinion, consistent with existing caselaw, and does not create law which extends beyond the particular facts in this case.

V. THE ALLEGED INVALIDITY OF THE WINDOW OF CORRECTION REGULATION IS NOT A BASIS FOR THIS COURT TO GRANT CERTIORARI REVIEW

The Petitioners argue to the Court that, if their interpretation of the window of correction is not accepted, the regulation embodying the window of correction must be declared "invalid under the Administrative Procedures Act ["APA"], 5 U.S.C. § 706(2)(A) and (C) as arbitrary,

capricious, an abuse of discretion, not in accordance with law, and 'short of statutory right'." This precise argument was rejected by the Court in *Auer.*

The respondents in *Auer* similarly argued to the Court that the disciplinary deduction rule embodied in 29 C.F.R. § 541.118(a) was "arbitrary" and "capricious" in violation of the APA. Justice Scalia, writing on behalf of a unanimous Court, noted:

> [T]here is no basis for the court to set aside the agency's action prior to any application for relief addressed to the agency itself. The proper procedure for pursuit of the respondents' grievance is set forth explicitly in the APA: a petition to the agency for rulemaking, § 553(c), denial of which must be justified by a statement of reasons, § 555(e), and can be appealed to the courts, §§ 702, 706.

Auer, 117 S. Ct. at 910.

To the extent the Petitioners' argument could be construed as a substantive challenge to the regulation based upon an alleged inconsistency between the regulation and the intent of the FLSA, such an argument must also fail. The Petitioners' reliance on the Court's decision in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989) is misplaced.

In *Betts*, the Court considered the substantive validity of a regulation it determined to be inconsistent with the intent requirements found in the Age Discrimination in Employment Act ("ADEA"). Since any discrimination

claim under the ADEA requires a showing of discriminatory intent, a regulation inconsistent with such an essential requirement cannot be upheld. *Betts*, 492 U.S. at 182. The same analysis is unavailable in this instance.

The Petitioners fail to cite to any statutory provision or any caselaw which establishes that a showing of intent is required to establish a violation of the FLSA. On the contrary, the issue of an employer's "intent" arises only *after* a determination of liability has been made and damages must be assessed. The employer's "intent" then becomes relevant in determining the applicable statute of limitations and whether to award liquidated damages. *See* 29 U.S.C. §§ 216(b), 255(a).

The window of correction is not "invalid," as urged by the Petitioners. It has been a tool used by the Secretary and by innumerable courts, including this Court, for many years. It is a logical and common-sense rule. The window of correction allows an employer, under appropriate circumstances, to make "whole" those employees whose salaries have been improperly reduced, and requires that the employer create a new policy certifying that impermissible deductions will never be made again. The result is that the employees receive their full pay and future mistakes are prevented. The only "negative" consequence of the window of correction is that large groups of employees, the vast majority of whom have never had their pay reduced, do not receive a windfall in the guise of damages for overtime pay which they were never intended to receive and which they never expected.

The window of correction is not analogous to the regulation which was struck down in *Betts*. Consequently,

since the Petitioners have otherwise failed to abide by the requirements of the APA in challenging the regulation, their argument in support of certiorari review must be rejected.

VI. THE PETITIONERS' ARGUMENT REGARDING REASSIGNMENT ON REMAND IS INSUFFICIENT TO WARRANT CERTIORARI REVIEW OF *DAVIS*

Although there is no indication that the judge created the appearance that he may be unable to perform his role in an unbiased manner, the Petitioners seek reassignment of this case in the event of remand. In an attempt to establish the existence of potential conflict, the Petitioners cite to *Offutt v. United States*, 348 U.S. 11 (1954), a case in which the actions of the trial judge do not remotely resemble the actions of the judge here. *Offutt* concerned a contempt proceeding heard by the same trial judge who had been personally embroiled with counsel throughout trial and who had made a statement to the jury indicating his hostility towards counsel. In arguing that the court "view the findings of fact and conclusions of law with caution, and not with the great deference normally accorded findings and conclusions prepared by a court," the Petitioners disregard the rule that findings of fact are reviewed for clear error. *See Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985) ("[E]ven when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous.")

The Petitioners received a fair hearing. The trial judge expressed his intention to find in favor of the City only after a lengthy and in-depth hearing which included

substantial colloquy with counsel for both sides. In addition, the Petitioners were given an opportunity to present objections and comments to the City's proposed order. *See In Re Colony Square*, 819 F.2d 272 (11th Cir. 1987) (a court's use of orders and opinions ghost written by counsel for prevailing party does not deny the other party due process). Bias sufficient to disqualify a judge exists when a judge's remarks demonstrate such pervasive bias and prejudice that it unfairly prejudices one of the parties. *U.S. v. Ramos*, 933 F.2d 968, 973 (11th Cir. 1991), *citing Whitehearst v. Wright*, 592 F.2d 834, 838 (5th Cir. 1979). While the Petitioners have taken certain language used by the trial judge out of context, it is clear that the judge played an active role during oral argument on the parties' motions for summary judgment and carefully considered the argument presented by both sides.

The conduct of the trial judge in this instance does not rise to the level required to constitute an "important and unresolved problem with far-reaching and recurring implications nationwide," as alleged by the Petitioners. Certiorari review of this issue is not warranted. Under the circumstances presented in this case and in accordance with this Court's ruling in *Anderson*, the Eleventh Circuit's treatment of the trial judge's factual findings was appropriate since they were not "clearly erroneous."[16]

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[16] The petitioners' request that a new judge be assigned on remand if certiorari is granted is immaterial to the Court's initial determination as to whether the petition should be granted.

CONCLUSION

Based upon the arguments set forth above, the Petitioners have failed to demonstrate the existence of a conflict either between *Davis* and any precedent of this Court or between *Davis* and the post-*Auer* decision of any other United States court of appeal with respect to an important matter. Additionally, the Petitioners have failed to establish the existence of an important question of federal law decided by the Eleventh Circuit in *Davis* that has not been, but should be, settled by this Court. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent

April 17, 1998

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 92-6993-CIV-RYSKAMP

BRUCE W. DAVIS, MIKE ROZOS, on behalf of themselves and all other present and former employees similarly situated,

Plaintiffs,

vs.

THE CITY OF HOLLYWOOD, a municipal corporation of the State of Florida

Defendant.

SATISFACTION OF JUDGMENT

KNOWN ALL MEN BY THESE PRESENTS that the City of Hollywood, Florida, the defendant in the above-styled case, wherein a judgment was rendered on November 30, 1995 in the above-named court for Nine Thousand Eight Hundred Seventeen and 11/100 ($9,817.11) Dollars against Bruce Davis; Robert S. Davis; Hugh Bowen; Mike Rozos; Bernice W. Rowe; Sylvester Jackson; Michael Ignasiak; Wesley Forestier; Ernest W. Atkins; William Shulby; Earl Mitchell; Russell L. Cormican; Ronald Pagano; Gilbert Frazier; James A. Walsh; Paul F. Glynn; George Geisler; Don E. Peoples; and Donald Allen, the plaintiffs therein, do hereby acknowledge full payment and satisfaction thereof, and hereby consent that the same shall be satisfied of record.

WITNESS my hand and seal this 16th day of April, 1998.

CITY OF HOLLYWOOD

By /s/ Jeffrey P. Sheffel
Jeffrey P. Sheffel
Acting City Attorney

STATE OF FLORIDA)
) ss.
BROWARD COUNTY)

BEFORE ME, the undersigned authority, personally appeared Jeffrey P. Sheffel, who is the Acting City Attorney for the City of Hollywood, and who is personally known to me, deposes and says that the facts set forth in the foregoing are true and correct.

WITNESSES my hand and seal this 16th day of April, 1998.

/s/ M. Stockman
Notary Public

M. Stockman
Print Name

Commission Expires:

M. Stockman my commission #CC529966 expires February 4 in the year 2000.

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 95-5304 & 95-5536

BRUCE W. DAVIS, MIKE ROZOS, on behalf of themselves and all other present and former employees similarly situated,

Plaintiffs-Appellants,

v.

THE CITY OF HOLLYWOOD, a municipal corporation of the State of Florida,

Defendant-Appellee.

SATISFACTION OF JUDGMENT

KNOWN ALL MEN BY THESE PRESENTS that the City of Hollywood, Florida, the defendant in the above-styled case, wherein a cost judgment was rendered on December 1, 1997 in the above-named court for One Hundred Three and 50/100 ($103.50) Dollars against Bruce Davis; Robert S. Davis; Hugh Bowen; Mike Rozos; Bernice W. Rowe; Sylvester Jackson; Michael Ignasiak; Wesley Forestier; Ernest W. Atkins; William Shulby; Earl Mitchell; Russell L. Cormican, Ronald Pagano; Gilbert Frazier; James A. Walsh; Paul F. Glynn; George Geisler; Don E. Peoples; and Donald Allen, the appellants therein, do hereby acknowledge full payment and satisfaction thereof, and hereby consent that the same shall be satisfied of record.

WITNESS my hand and seal this 16th day of April, 1998.

CITY OF HOLLYWOOD

By /s/ Jeffrey P. Sheffel
Jeffrey P. Sheffel
Acting City Attorney

STATE OF FLORIDA)
) ss.
BROWARD COUNTY)

BEFORE ME, the undersigned authority, personally appeared Jeffrey P. Sheffel, who is the Acting City Attorney for the City of Hollywood, and who is personally known to me, deposes and says that the facts set forth in the foregoing are true and correct.

WITNESSES my hand and seal this 16th day of April, 1998.

/s/ M. Stockman
Notary Public

M. Stockman
Print Name

Commission Expires:

M. Stockman my commission #CC529966 expires February 4 in the year 2000.